LEGAL OPINION

ON THE CONFORMITY OF ARTICLE 10.6

OF THE 2007 DRAFT WORLD ANTI-DOPING CODE WITH

THE FUNDAMENTAL RIGHTS OF ATHLETES

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I. PRELIMINARY COMMENTS

1. QUALIFICATIONS OF THE AUTHORS OF THIS OPINION

1. Gabrielle Kaufmann-Kohler is a professor of law at the University of Geneva, Switzerland. She teaches private international law, including international arbitration and is the Director of the Geneva Master in International Dispute Settlement. She regularly lectures at various universities and international conferences on the resolution of international sports disputes.

Professor Kaufmann-Kohler is also a practicing attorney-at-law admitted to the Geneva and New York State bars. She is presently a partner of Schellenberg Wittmer and a funding partner of Lévy Kaufmann-Kohler as of 1 January 2008. Her practice is focused on international arbitration, nowadays almost exclusively as arbitrator. In addition, she represents litigants before the Swiss Federal Supreme Court in arbitration-related matters. She is on the arbitration panels of major arbitration institutions, including the International Centre for Settlement of Investment Dispute ("ICSID") of the World Bank. She has advised the Court of Arbitration for Sport ("CAS") and several international federations on their dispute resolution system. Professor Kaufmann-Kohler participated in drafting the amended Rules of the CAS and in preparing the related structure reform of this institution in 1994. She also drafted the Rules for the ad hoc Division of the CAS at the Olympic Games and chaired this division from its inception in Atlanta in 1996 to the Olympic Games in Sydney in 2000. She was further a member of the Jury of the XXXII America's Cup (2003-2006).

Professor Kaufmann-Kohler is an Honorary President of the Swiss Arbitration Association, sits on the International Arbitration Court of the International Chamber of Commerce ("ICC"), on the board of the Swiss Society of International Law and is a member of the International Council for Commercial Arbitration ("ICCA"), a worldwide body with forty members.

Finally, Professor Kaufmann-Kohler is the author of numerous publications in the area of private international law, international dispute resolution and the arbitration of sports disputes, including a book published in 2001 entitled "Arbitration at the Olympics". A *curriculum vitae* is attached as Annex B.

2. Dr. Antonio Rigozzi is a lecturer of law at the University of Neuchâtel, Switzerland. He teaches international arbitration and sports law, including legal issues related to doping. He regularly lectures at various universities and international conferences on international sports arbitration.

Dr. Rigozzi is also a practicing attorney-at-law at the bar of Geneva, Switzerland, presently with Schellenberg Wittmer and, starting 1 January 2008, a partner of Lévy Kaufmann-Kohler. His practice focuses on international arbitration, in both commercial and sports-related matters. He regularly represents athletes and sports governing bodies in doping disputes and is a member of the Arbitral Tribunal of Swiss Athletics.

He is also the author of a number of publications in the area of international law and sports law, including a book published in 2005 entitled *"L'arbitrage international en matière de sport"*, i.e., "International Arbitration of Sports Disputes". A *curriculum vitae* is attached as Annex C.

3. On 26 February 2003, the authors of this opinion provided together with Professor Giorgio Malinverni – who is now a Judge at the European Court of Human Rights – a "Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law" (the "First Opinion").[1]

2. INDEPENDENCE AND DISCLAIMER

4. The authors are independent from WADA and have never represented whether collectively or individually WADA in any legal proceedings either before or after the drafting of the First Opinion.

5. Finally, it should be noted that the present opinion was drafted on a non-commercial basis.[2]

6. The authors do not express any views with respect to any relevant factual elements which may not have been brought to their attention.

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[1] The First Opinion is available at http://www.wada-ama.org/rtecontent/document/kaufmann-kohler-full.pdf. An updated version has also been published under RIGOZZI/KAUFMANN-KOHLER/MALINVERNI, *Doping and Fundamental Rights of Athletes: Comments in the Wake of the Adoption of the World Anti-Doping Code*, in: International Sports Law Review 2003, pp. 39 *et seq.*

[2] The authors wish to thank Ms. Marjolaine Viret, attorney-at-law and assistant at the University of Fribourg Law School, as well as Mr. Alexis Schoeb and Ms. Delphine Jobin, attorneys-at-law at Schellenberg Wittmer, for their invaluable contribution in preparing this opinion.

3. THE QUESTION POSED, THE DOCUMENT(S) REVIEWED, AND THE ISSUES ADDRESSED

7. We have been asked to opine on the conformity of Article 10.6 of Draft 3.0 of the World Anti-Doping Code – 2007 Code Amendments (the "2007 Draft Code")[3] with the fundamental rights of athletes.

8. Article 10.6 of the 2007 Draft Code reads as follows:

> **10.6 Aggravating Circumstances Which May Increase the Period of Ineligibility**
>
> If the Anti-Doping Organization establishes in an individual case involving an anti-doping rule violation other than violations under Article 2.7 (Trafficking) and 2.8 (Administration) that aggravating circumstances are present which justify the imposition of a period of Ineligibility greater than the standard sanction, then the period of Ineligibility otherwise applicable shall be increased up to a maximum of four years unless the Athlete or other Person can prove to the comfortable satisfaction of the hearing panel that he did not knowingly violate the anti-doping rule.
>
> An Athlete or other Person can avoid the application of this Article by admitting the anti-doping rule violation as asserted promptly after being confronted with the anti-doping rule violation by an Anti-Doping Organization.
>
> *[Comment to Article 10.6: Examples of aggravating circumstances which may justify the imposition of a period of Ineligibility greater than the standard sanction are: the Athlete or other Person committed the anti-doping rule violation as part of a doping plan or scheme, either individually or involving a conspiracy or common enterprise to commit anti-doping rule violations; the Athlete or other Person used or possessed multiple Prohibited Substances or Prohibited Methods or used or possessed a Prohibited Substance or Prohibited Method on multiple occasions; a normal individual would be likely to enjoy the performance-enhancing effects of the anti-doping rule violation(s) beyond the otherwise applicable period of Ineligibility; the Athlete or Person engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation.*
>
> *For the avoidance of doubt, the examples of aggravating circumstances described in this Comment to Article 10.6 are not exclusive and other aggravating factors may also justify the imposition of a longer period of Ineligibility. Violations under Article 2.7 (Trafficking) and 2.8 (Administration) are not included in the application of Article 10.6 because the sanctions for these violations (from four years to lifetime Ineligibility) already build in sufficient discretion to allow consideration of any aggravating circumstance.]*

[3] Draft 3.0 was published on 15 October 2007 on WADA's website at http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=707.

9. In the course of preparing this opinion, we have been provided with the final version of the 2007 Draft Code. As background information, we have also consulted the two previous drafts and the comments thereto by the stakeholders as published on WADA's website,[4] as well as the minutes of the WADA Foundation Board and Executive Committee meetings during which the question of aggravating circumstances was discussed.[5]

10. With respect to the structure of this opinion, we will first introduce the main concepts of the anti-doping rules and of the fundamental rights of athletes as well as their interaction (Part II). We will then examine whether Article 10.6 of the 2007 Draft Code is compatible with such fundamental rights (Part III).

11. To take the most conservative approach, we will assume that the fundamental guarantees governing criminal procedures are applicable in doping disputes and will focus our analysis on the following three main issues:

    (i) Are "Aggravating Circumstances" defined with sufficient precision in order to comply with the principle 'no crime nor punishment without law' (*nullum crinem, nulla poena sine lege)*?

    (ii) Is the possibility to avoid the application of an increased sanction by admitting the anti-doping rule violation as asserted compatible with the privilege against self-incrimination and the right to remain silent (*nemo tenetur* principle)?

    (iii) Does the imposition of an ineligibility period of more than two years comply with the principle of proportionality?

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4 Available at the "Code Review" section of WADA's website http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=582.

5 Available at the "Governance" section of WADA's website http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=258.

II. THE INTERACTION BETWEEN ANTI-DOPING RULES AND THE FUNDAMENTAL RIGHTS OF ATHLETES

1. THE WORLD ANTI-DOPING AGENCY (WADA) AND THE WORLD ANTI-DOPING CODE (WADA CODE)

12. Traditionally each sports governing body adopted its own anti-doping rules. These uncoordinated efforts proved unsatisfactory. Resources necessary to conduct research and testing were insufficient; so was the knowledge about specific substances and procedures; and there were divergent approaches to penalties for athletes found guilty of doping.

1.2 The Structure and the Mission of WADA

13. The World Anti-Doping Agency (WADA) was established following a World Conference convened by the International Olympic Committee in February 1999 in Lausanne with the specific aim of promoting and coordinating at the international level the fight against doping in sports of all forms. WADA is a unique organization in particular as to its global composition with half its "stakeholders" being the Governments or public authorities of the world, and the other half coming from the Olympic Movement or private international sporting bodies. It is independent of the Olympic Movement, and in particular of the International Olympic Committee ("IOC"), and of the States that took part in its formation or that participate in its activities. While presently headquartered in Montreal, Canada, WADA is a Swiss private law foundation, which is governed by Articles 80 and following of the Swiss Civil Code ("CC").[6] It is operated by a Foundation Board of 38 members, and an Executive Committee of 12 members.

14. WADA was entrusted with preparing a universal code on anti-doping, with the aim of harmonizing the many rules and laws then in effect around the world and ensuring, in particular, that athletes are treated equally by sporting bodies and governments in anti-doping issues.

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[6] Swiss Federal Tribunal *X [Danilo Hondo] v. WADA et al & TAS* 4P.148/2006 Decision of 10 January 2007, Bull. ASA 2007, p. 569, *572*; SpuRt 2007, p. 65, note Netzle.

1.3 The Adoption and the Implementation of the WADA Code

15. Following extensive consultations[7] and repeated drafting exercises, the World Anti-Doping Code (the "WADA Code" or "the Code") was adopted by the World Conference held in Copenhagen in March 2003. The WADA Code is the core document that provides the framework for harmonized anti-doping policies, rules, and regulations within sports organizations and among public authorities.

16. Implementation has taken place with various changes to the anti-doping rules of the sports organizations. Along with the sporting movement, Governments have committed to implement the WADA Code through the ratification of the International Convention against Doping in Sport concluded under the aegis of the UNESCO on 19 October 2005 (the "UNESCO Convention"). Pursuant to Article 3(a) of the UNESCO Convention "the States Parties undertake […] to adopt appropriate measures at the national and international levels which are consistent with the principles of the [WADA] Code".

17. As a result of the WADA Code, the international sports community is governed by a uniform set of anti-doping rules. The Code works in conjunction with four international standards issued by WADA and aiming at bringing harmonization among anti-doping organizations in various areas: testing, laboratories, therapeutic use exemptions (TUEs) and the list of prohibited substances and methods.

1.4 The Rationale of the WADA Code

18. In the introduction to the Code, the "fundamental rationale for the World Anti-Doping Code" is stated to be to "preserve what is intrinsically valuable about sport". This intrinsic value is often referred to as "the spirit of sport"; it is "the essence of Olympism"; it is "how we play true". As discussed in more detail in our First Opinion, the rationale of (private) anti-doping rules in general and of the WADA Code in particular are four-fold:

- *to ensure a level playing field*. This is, in our opinion, the most important rationale of anti-doping rules. It has been generally recognized by the courts. In the words of the Ontario Court of Justice in the *Ben Johnson* case, anti-doping rules are "necessary to protect the right of the athlete, including Mr. Johnson, to fair

[7] One specific aspect of these consultations was WADA's request for the First Opinion, which led to the taking into account of the requirement of fault as a condition for imposing sanctions (*see* RIGOZZI/KAUFMANN-KOHLER/MALINVERNI, *cit*. *supra* Fn. 1, p. 55, Fn. 24 and p. 58, Fn. 43-44).

competition, to know that the race involves only his own skill, his own strength, his own spirit and not his own pharmacologist"[8].

- *To ensure the protection of the athletes' health*. To quote again the Ontario Court "it is necessary to protect Mr. Johnson for the sake of his own health from the effects of consistently using prohibited substances".[9]

- *To ensure the social (and economic) standing of sport.* It is a fact of life that when an athlete is found guilty of a doping offence, the other competitors[10] and the entire sport are affected in their social[11] and financial status.[12] The High Court of Munich in the *Kathrin Krabbe* case agreed that there is a "need to ensure a clean sport without pharmacological manipulations, and the damaging effect of offences like those at hand on the image of the sport."[13]

- *To provide role models:*[14] It is a basic premise of anti-doping regulation that sportsmen and women, in particular the most successful ones, are highly visible public persons who enjoy a very special status in society and are thus examples to follow for younger generations.[15]

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8 *Johnson v. Athletic Canada and IAAF*, [1997] O.J. No. 3201, at 29. *See* also *Krabbe v. IAAF et. al.*, Decision of the OLG Munich of 28 March 1996, SpuRt 1996, p. 133, 134 with respect to the necessity of out-of-competition tests.

9 *Johnson v. Athletic Canada and IAAF*, [1997] O.J. No. 3201, para 29.

10 Edward GRAYSON, Gregory IOANNIDIS, *Drugs, Health and Sporting Values*, in: Sport: Socio-Legal Perspectives, London-Sydney, 2001, pp. 253.

11 Van Staveren, quoted by JanWillem SOEK, *The Legal Nature of Doping Law*, The International Sports Law Journal 2002/2, p. 2.

12 Mary K. FITZGERALD, *The Court of Arbitration for Sport: Doping and Due Process During the Olympics*, Sports Lawyer Journal 2000, p. 234: "Such illicit behaviour affects future […] sponsorship deals, not to mention public support […]"

13 OLG Munich *Krabbe v. IAAF et. al.*, Decision of 28 March 1996, SpuRt 1996, p. 133, *135* (free translation).

14 The introduction to the Code refers to "character and education" as values characterizing the "spirit of sport."

15 The Ontario Court of Justice specifically recognized this policy rationale in the Ben Johnson case: "The elite athlete is viewed as a hero and his influence over the young athlete cannot be underestimated [and, referring to the Dubin Inquiry, that] [w]hen role models in sport, or in any other endeavor, are seen to cheat and prosper, then it is natural than young people will learn to do the same" (*Johnson v. Athletic Canada and IAAF*, [1997] O.J. No. 3201).

19. Except for some very isolated philosophical[16] and legal[17] objections, the pressing need for anti-doping regulation is generally recognized, including by the States.[18] This became particularly clear in October 2005 with the unanimous adoption by the 33rd UNESCO General Conference of the International Convention against Doping in Sport, according to which the Member States declared their intent to embed the principles of the WADA Code in the national legislations.[19] Indeed, in the Preamble of the UNESCO Convention, the States express their support of the WADA Code *inter alia* by:

> [being c]onscious that sport should play an important role in the protection of health, in moral, cultural and physical education and in promoting international understanding and peace,
>
> Noting the need to encourage and coordinate international cooperation towards the elimination of doping in sport,
>
> [being c]oncerned by the use of doping by athletes in sport and the consequences thereof for their health, the principle of fair play, the elimination of cheating and the future of sport, […]
>
> [being m]indful also of the influence that elite athletes have on youth, […]
>
> [being a]ware that public authorities and the organizations responsible for sport have complementary responsibilities to prevent and combat doping in sport, notably to ensure the proper conduct, on the basis of the principle of fair play, of sports events and to protect the health of those that take part in them, […]
>
> Recognizing that the elimination of doping in sport is dependent in part upon progressive harmonization of anti-doping standards and practices in sport and cooperation at the national and global levels,

1.5 The Main Features of the WADA Code

20. Anti-doping regulations in general and the WADA Code in particular consist of two basic elements: (i) a catalogue of doping offences (called anti-doping rule violations); and (ii) a series of sanctions to be imposed when an athlete is found to have committed

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16 Claudio TAMBURRINI, *The "hand of God"?: Essays in the philosophy of sports*, Goteborg, 2000, *passim*.

17 Neville COX, *Legalisation of Drug Use in Sport*, ISLR 2002, pp. 77-88; Ralf LENZ, *Die Verfassungsmässigkeit von Anti-Doping-Bestimmungen*, Frankfurt [etc.], 2000, *passim*.

18 See for instance the EC Commission staff working document the EU and sport: background and context accompanying document to the White Paper on sport [com(2007) 391 final], available at http://ec.europa.eu/sport/whitepaper/dts935_en.pdf.

19 In the words of the Swiss Government, *"la Convention fait office de déclaration d'intention pour ancrer dans la législation des pays signataires les dispositions et les principes du Code mondial antidopage".*

such offences. The most common doping offence is the presence in the athlete's body of a prohibited substance (i.e., a substance set out on the so-called "Prohibited List"). The classic sanction for doping is the imposition of a suspension (called "Ineligibility Period"), during which the athlete is prohibited from participating in any competition.

21. The WADA Code provides that any dispute concerning the imposition of a sanction following an anti-doping offence in cases arising from competition in an international event or in cases involving international-level athletes will be decided exclusively by the Court of Arbitration for Sport ("CAS").

22. Traditionally, suspended athletes have attempted to challenge their sanction in front of the courts and/or the CAS by claiming *inter alia* that the sanction violates their fundamental rights.[20]

2. FUNDAMENTAL RIGHTS OF ATHLETES: CONCEPT, SOURCES

23. For the sake of this opinion we will consider the following possible fundamental rights of athletes: (a) human rights, (b) fundamental procedural guarantees of criminal law, (c) personality rights, and (d) rights based on competition law.

2.2 Human Rights

24. According to a classic definition, human rights are "the rights and prerogatives ensuring the liberty and the dignity of human beings, and that can benefit from institutional guarantees".[21]

25. There is a large number of legal texts dealing with human rights, ranging from solemn but non-binding declarations to precise codes accompanied by stringent mechanisms for control and enforcement.[22] In this opinion, we will often refer to the following texts:

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[20] For the latest attempt, i.e. the *Kashechkin* case, *see* "Court case seeking to undermine fundamentals of anti-doping fight opens", *International Herald Tribune* of 6 November 2006; *see* also Simon MEIER, "La plainte qui fait trembler la planète sport", *Le Temps* of 10 November 2007; Lionel BIRNIE, *Comment: Human Rights? Don't make me laugh*, in Cycling Week of 6 November 2007.

[21] Frédéric SUDRE, *Droit international et européen des droits de l'homme*, Paris 2001, p. 12 (free translation of the original French text*: "les droits et facultés assurant la liberté et la dignité de la personne humaine et bénéficiant de garanties institutionelles"*). Andreas AUER, Giorgio MALINVERNI, Michel HOTELLIER, *Droit constitutionnel Suisse, Volume II: Les droits fondamentaux*, Bern, 2000, NNo. 6-11, pp. 4-6. These authors speak of "*libertés fondamentales"*, which is the classical terminology used when analyzing human rights on a national (constitutional) basis.

- The *International Covenant on Civil and Political Rights of the United Nations*[23] ("UNCCR") of 16 December 1966, which is in force since 1976, and has been ratified by 152 countries.

- The *International Covenant on Economic, Social and Cultural Rights of the United Nations*[24] ("UNCSR") of 16 December 1966, which came into force on 3 January 1976 and has been ratified by 149 countries.

- The Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, generally referred to as the *European Human Rights Convention* ("EHRC"),[25] which has been in force since 1953 and is currently binding in 47 European countries, ranging from Portugal to Russia.

- The Council of Europe's *European Social Charter* of 1961,[26] which entered into force in 1965 and is currently binding in 27 European countries. The European Social Charter has had a significant impact on the domestic laws of its State parties.

26. The issue of the applicability of human rights in disciplinary disputes and in particular in doping disputes was discussed in detail in our First Opinion.[27] In substance, after a comparative analysis we came to the clear conclusion that:

> according to the prevailing contemporary judicial practice, human rights, and in particular the specific procedural guarantees in criminal matters, are not applicable to doping disputes before private sports governing bodies.

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22 On the different international human rights instruments, *see* Paul SIEGHART, The International Law of Human Rights, Oxford, 1983, pp. 24-32.

23 UN International Covenant on Civil and Political Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

24 Available at http://www.unhchr.ch/html/menu3/b/a_cescr.htm.

25 Available at http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm.

26 Available at http://conventions.coe.int/Treaty/en/Treaties/Html/035.htm.

27 *See* First Opinion, ¶¶ 62-72; RIGOZZI/KAUFMANN-KOHLER/MALINVERNI, *cit*. *supra* Fn. 1, pp. 46-49, where we referred *inter alia* to the case law of the Swiss Federal Tribunal, in particular *Abel Xavier v. UEFA,* Decision of 4 December 2000, ATF 127 III 429, ASA Bulletin 2001, p. 566, *573* and *Gundel c. Fédération Equestre Internationale*, Decision of 15 March 1993, reported (and translated) in CAS Digest I, p. 561, 5*71-572*.

27. Like we did in the First Opinion, for the purpose of the present opinion, we will assume that the current approach of the courts might evolve in the future towards enforcement of human rights in sports matters. Indeed, mainly because sports governing bodies hold a monopolistic "quasi-public" position in their relation with the athletes, there is a growing understanding among legal commentators that sports governing bodies can no longer ignore fundamental right issues in their activities,[28] at least if they intend to avoid governmental intervention.[29] After all, the UNESCO Convention itself was adopted with a specific "refer[ence] to existing international instruments relating to human rights" (see Preamble, first ground).

28. Assuming they apply at all, a whole range of human right guarantees may come into play in doping matters. With respect to Article 10.6 of the 2007 Draft Code, and in particular to the possibility of imposing a longer ineligibility period of up to four years, the following human rights are at stake:

- *Right to personal liberty*. Like the football player *Abel Xavier* in front of the Swiss Federal Tribunal,[30] the athletes may be tempted to challenge the imposition of a suspension on the ground that it violates the guarantee of personal liberty provided by Article 8 EHRC.

- *Right to work*. For professional athletes a suspension further impacts their right to work, which includes the "right of everyone to the opportunity to gain his living by work which he freely chooses or accepts" (Article 6 of the UNCSR).[31]

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28 See the very authoritative view of Prof. Rigaux that "a better compliance with the fundamental rights of the athlete requires a more intense control by the States (which, nowadays, is very variable among states but insufficient in the majority of them) and that they conceive it as an obligation, the violation of which could justify a condemnation by the European Court of Human Rights" (François RIGAUX, *Le droit disciplinaire du sport*, Revue trimestrielle des droits de l'homme 1995, p. 312 (free translation of the French original); *see* also Luc MISSON, *The new Anti-Doping Code – an unlawful veneer of justice?,* in 3. Internationaler Sportrechtskongress, Bonn, 2004, pp. 321 *et seq*. From the point of view of procedural public policy and due process, see also Jannica HOUBEN, *Proportionality in the World Anti-Doping Code: Is There Enough Room for Flexibility?*, The International Sports Law Journal 2007, pp. 16-17; Jens ADOLPHSEN, *Implementation of the World Anti-Doping Code and European Procedural Public Policy*, in 3. Internationaler Sportrechtskongress, Bonn, 2004, pp. 355 *et seq*.

29 Tony MORTON-HOOPER, *The Right to a Fair Hearing*, Sports and the Law Journal 2001, p. 158.

30 Swiss Federal Tribunal, *Abel Xavier v. UEFA,* Decision of 4 December 2000, ATF 127 III 429, ASA Bulletin 2001, p. 566 in respect of Article 8 EHRC.

31 The right to work is set forth in similar terms by Article 1 of the European Social Charter.

29. While in the following paragraphs we will refer exclusively to these rights by reference to Articles 8 EHRC and 6 UNCSR, it bears pointing out that athletes can invoke similar guarantees provided by national instruments dealing with human rights, particularly national constitutions.[32] For instance, in the so-called *Chinese Swimmers* case, a CAS award was challenged in front of the Swiss Federal Tribunal on the ground that the suspension constituted a violation of the swimmers' personal liberty (*liberté personnelle*) and more particularly freedom of movement (*liberté de mouvement*) pursuant to Article 10(2) of the Swiss Federal Constitution.[33] Similarly, in the *Abel Xavier c*ase referred to above, the player invoked the "economic freedom" (*liberté économique*) guaranteed by Article 27 of the Swiss Constitution, which includes the freedom to choose one's profession and freedom in the exercise of such profession.[34] In Germany, the right to work is guaranteed by Article 12(1) of the German Constitution and is often relied upon by professional athletes challenging a suspension by a sports governing body.[35]

2.3 General Principles of Criminal Procedure

30. Having assumed that human rights do apply in disputes between athletes and sports governing bodies in general,[36] the next question is whether the specific procedural guarantees that human rights instruments afford in criminal matters (for instance Article 6(2-3) and 7 EHRC) are also applicable in doping proceedings.

31. As a matter of principle, Article 6(2-3) and 7 EHRC apply only in case of a "criminal charge" within the meaning of Art. 6 EHRC and are thus not applicable in doping

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32 It is important to appreciate that the proliferation of international and regional instruments for the protection of human rights has not lessened the significance of national instruments dealing with fundamental rights, particularly national constitutions. It would not be possible to consider all potentially relevant national constitutions within the scope of this opinion. Instead, consistent with the general approach of this opinion, we will refer, as illustrative examples, to various provisions of the recently revised Swiss Federal Constitution and the German Federal Constitution.

33 Swiss Federal Tribunal, *Lu Na Wang*, Decision of 31 March 1999, CAS Digest II, p. 767.

34 AUER/MALINVERNI/HOTELLIER, *cit. supra* Fn. 21, NN° 608-609, p. 316. As noted above, Article 27 of the Swiss Constitution was invoked by the athlete in the *Abel Xavier* case.

35 *See* Grischka PETRI, *Die Sanktionsregeln des World Anti-Doping-Codes*, SpuRt 2003, p. 231 and the references.

36 That said it bears noting that the current approach of the Swiss Federal Tribunal is that doping proceedings concern issues of private law that do not need to be considered "in the light of notions proper to criminal law, such as the presumption of innocence and the principle *'in dubio pro reo'*, and corresponding guarantees which feature in the European Convention of Human Rights" (*Gundel v. FEI*, Decision of 15 March 1993, reported (and translated) in *CAS Digest I*, p. 561, *575*).

disputes. Indeed, the Swiss Federal Tribunal held that doping proceedings concern issues of private law that do not need to be considered "in the light of notions proper to criminal law, such as the presumption of innocence and the principle *'in dubio pro reo'*, and corresponding guarantees which feature in the European Convention of Human Rights."[37] The solution is equally clear under U.S. law.[38]

32. That said, the application by analogy of such guarantees should not be ruled out, in particular in light of the European Court of Human Rights' case law that the term "criminal" must be interpreted in an autonomous manner.[39] In practice, the Court considers that an offence amounts to a criminal charge if at least one[40] of the following criteria are met: (i) it qualifies as a criminal offence under the relevant national law; (ii) it is criminal in nature; or (iii) its violation leads to a sanction the nature and severity of which are comparable to criminal sanctions. According to the European Court of Human Rights, the two last criteria[41] compel the application of the procedural guarantees of Article 6(2-3) and 7 EHRC to administrative proceedings in which the adjudicatory body can impose a fine which is "substantial",[42] "punitive and deterrent rather than compensatory".[43]

33. What about private disciplinary proceedings in doping cases? One can hardly deny that the imposition of a two-year ineligibility period to an athlete may constitute a severe sanction. Moreover, the imposition of such a suspension is not compensatory but rather appears to be "punitive and deterrent" within the meaning of the case law of the European Court of Human Rights. With regard to Article 10.6 of the Draft Code, one

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37 *Gundel v. FEI*, Decision of 15 March 1993, reported (and translated) in *CAS Digest I*, p. 561, 575.

38 *See* below ¶ III.2.99.

39 ECHR *Welch v. UK*, No. 17440/90, Judgment of 9 February 1995, at 27. *See* also ECHR *Coëme and others v. Belgium* (32/492/96), Judgment of 22 June 2000, at 145.

40 Should such an analysis be inconclusive, the Court may consider the different criteria according to a "cumulative approach" (Karen REID, *A practitioner's guide to the European Convention on Human Rights*, 2nd ed., London 2004, at IIA-008)

41 The fact that the Code itself provides that "anti-doping rules are distinct in nature and are, therefore, not intended to be subject to or limited by any national requirement and legal standard applicable to criminal proceedings" (*see* Introduction *in fine*) is relevant exclusively from the point of view of the first criterion set out by the European Court of Human Rights (i.e. qualification under the relevant law).

42 Referring to the case law of the European Court of Human Rights, the Swiss Federal Tribunal held the view that a disciplinary fine of CHF 5'000 against an attorney does not qualify as criminal, but left the question open with respect to higher pecuniary disciplinary sanctions (ATF 128 I 346, at 2.3).

43 ECHR *Irving Brown v. UK*, No. 38644/97, Decision of 24 November 1998, at 1.

could emphasize the fact that the sanction may be particularly severe, since, in case of aggravating circumstances, the adjudicatory body can impose a suspension of up to four years. It could also be put forward that the very concept of "aggravating circumstances" is deeply embedded in criminal law and that a sanction based on aggravating circumstances will have a clear stigmatizing effect.

34. Moreover, a trend towards the application of general principles of criminal procedure in doping seems to emerge both in legal writings[44] and, to a lesser extent, in the case law of the Court of Arbitration for Sport[45] (at least as general principles of law applicable in doping cases[46]).

35. Under these circumstances, as we noted in the wake of the adoption of the Code, it is undeniable that:

> WADA's effort to ensure the compatibility of the new Code with fundamental rights and to devote special attention to the criminal law procedural guarantees embodied in Article 6[(2-3 and 7] EHRC is a welcome development in the sports arena.[47]

36. With respect to Article 10.6 of the 2007 Draft Code and in particular to the definition of "aggravating circumstances", the most relevant procedural guarantee at stake is "No punishment without law" within the meaning of Article 7 EHRC:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier

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44 *See* for instance Thomas SUMMERER, Schutz der Individualrechte des Sportlers, in [1st] international congress on law and sport, Bonn, 2000, p. 148-150; Margareta BADDELEY, *Dopingsperren als Verbandssanktion aus nationaler und internationaler Sicht*, in J. Fritzweiler (ed.) *Doping – Sanktionen, Beweise, Ansprüche*, Bern [etc.], 2000, p. 17 ss; JanWillem SOEK, The strict liability principle and the human rights of athletes in doping cases, The Hague, 2006, Chapter 6, *passim*; Corinna COORS, Die Rechte des Sportlers im Dopingverfahren, Causa sport 2006, p. 548, 549; Alec VAN VAERENBERGH, Regulatory Features and Administrative Law Dimensions of the Olympic Movement's Anti-doping Regime, IILJ Working Paper 2005/11 (Global Administrative Law Series), pp. 13-16, available at http://www.iilj.org/papers/documents/2005.11Vaerenbergh.pdf; Paul C. MCCAFFREY, *Playing Fair: Why the United States Anti-Doping Agency's Performance-Enhanced Adjudications Should Be Treated as State Action*, Journal of Law & Policy 2006, in particular pp. 658-659.

45 *See* for instance Andrea PINNA, Trials and Tribulations of the Court of Arbitration for Sports, in: The Court of Arbitration for Sport (1984-2004),The Hague, 2006, p. 386, *407*.

46 Antonio RIGOZZI, *L'arbitrage international en matière de sport*, Basle, 2005, Nos. 1277 *et seq*.

47 RIGOZZI/KAUFMANN-KOHLER/MALINVERNI, *cit*. *supra* Fn. 1, p. 49.

penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

37. Inasmuch as it allows an athlete (or another involved person) to avoid the application of the aggravated sanction "by admitting the anti-doping rule violation", Article 10.6 of the 2007 Draft Code deserves further analysis in light of the rule against self-incrimination provided in Article 14(3)(g) UNCCR:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: […]
>
> Not to be compelled to testify against himself or to confess guilt.

2.4 Private Law Protection of Fundamental Rights, in particular Personality Rights

38. Irrespective of any horizontal application of human rights standards in sports matters (i.e. application between an individual and a private association), a similar protection is afforded by private law.

39. In the following paragraphs, we will focus on the private law protection of fundamental rights of athletes under Swiss law.[48] Swiss law is pivotal in anti-doping disputes because the vast majority of the international federations that have implemented the WADA Code (and will implement the 2007 Draft Code) are incorporated in Switzerland.[49] As already mentioned, according to Article 13.2.1 of the Code, all disputes between one of these federations and international-level athletes (or arising from competition in an international event) "may be appealed exclusively to CAS in accordance with the provisions applicable before such court [i.e. the CAS Code]" and

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48 For similar developments under (and analogies with) German law, see Ulrich HAAS, Ki-Yeon NAM, *Einschränkungen der Persönlichkeitsrechte durch Verbandsregelungen und Vertrag: am Beispiel des Dopingregelwerks der (Para-) Olympischen Spiele in Athen*, in: Persönlichkeitsrechte im Sport, Stuttgart, 2006, pp. 43-69.

49 According to some scholars, the WADA Code itself is governed by Swiss law. These scholars consider that the need for consistency requires the application of Swiss law even if the governing body having implemented the Code is incorporated in another country (Margareta BADDELEY, *The Puerta Case*, Causa Sport 2006, p. 375).

will thus be governed – as a matter of principle[50] – by Swiss law (Article R58 of the CAS Code).[51]

40. CAS jurisprudence has consistently applied the standards of Article 28 CC to decisions rendered by international federations incorporated in Switzerland:

> From a Swiss law perspective, it must be remembered that the relationship between a sports organization, such as a National Federation or a sport club, and its members is governed by private law and must conform to Articles 28 and 69 of the Swiss Civil Code and to the Swiss Code of Obligations.
>
> (CAS 2006/A/1025 *Puerta v. ITF*, § 11.7.15)[52]

41. Under the heading "Protection against infringements of personality rights", Article 28 CC reads as follows:

> 1. Where anyone suffers an illicit infringement to his personality, he can apply to the judge for his protection against any person participating in the injury.
> 2. An infringement is illicit, except when justified by the victim's consent, by an overriding private or public interest, or by the law.

42. It is undisputed under Swiss law that the imposition of an ineligibility period constitutes an infringement of the athletes' "right of economic liberty" and "right to personal fulfillment through sporting activities" and is thus an infringement of their personality rights within the meaning of Article 28(2) CC.[53] The Swiss Federal Tribunal has

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50 Antonio RIGOZZI, *cit. supra* Fn. 46, No. 1194 *et seq.*; *see* also Ulrich HAAS, *Die Vereinbarung von "Rechtsregeln" in (Berufungs-) Schiedsverfahren vor dem Court of Arbitration for Sport*, Causa Sport 2007, p. 271 *et seq*.

51 Art. R58 of the CAS Code provides the following in respect to the "Law Applicable" to the merits of the dispute: "The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according *to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled* or according to the rules of law, the application of which the Panel deems appropriate" (emphasis added).

52 Also reported in BADDELEY, *cit supra* Fn. 49, p. 373.

53 See for instance Margareta BADDELEY, *Le sportif, sujet ou objet?*, Revue de droit suisse 1996, p. 182.

recognized that a ban of two years results in a restriction of athletes' personality rights.[54]

43. Pursuant to Article 28 CC, an infringement to the personality rights is presumed to be illicit. This illicit character may be lifted only if the infringement is justified pursuant to Article 28(2) CC. In the words of a recent landmark CAS award, this means that:

> In the event of an infringement of the right of an individual's economic liberty or his right to personal fulfillment through sporting activities, the conditions set at Article 28 al. 2 of the Swiss Civil Code are applicable. Such infringement must be based either on the person's consent, by a private or public interest or the law.
>
> (CAS 2006/A/1025 *Puerta v. ITF*, § 11.7.15)

44. Under Swiss law there is no legal provision that could justify an infringement of the athletes' personality rights in doping disputes between an athlete and a sports governing body.

45. In sports matters, a justification "by consent" may be subject to attack in certain circumstances. Because of the monopolistic situation of the different sports governing bodies, the athletes have no choice but to consent to the applicable sports regulations.[55]

46. The issue of the enforceability of an athlete's consent in doping disputes is currently pending before the Swiss Federal Tribunal.[56] Indeed, the rationale in favor of unenforceability was set out in another recent decision by the Swiss Federal Tribunal in the *Cañas* decision in the following terms:

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54 Swiss Federal Supreme Court, *Lu Na Wang et al. v. FINA* (5P.83/1999), Decision of 31 March 1999, CAS Digest II p. 767, 772.

55 *See* Heinz HAUSHEER, Regina AEBI-MÜLLER, *Sanktionen gegen Sportler – Voraussetzungen und Rahmenbedingungen, unter besonderer Berücksichtigung der Doping-Problematik*, RSJB 2001, p. 355; Jörg SCHMID, *Persönlichkeitsrecht und Sport*, in: Privatrecht im Spannungsfeld zwischen gesellschaftlichem Wandel und ethischer Verantwortung, Festchrift für Heinz Hausheer zum 65. Geburtstag, Bern, 2002, p. 134; *contra*, Claude ROUILLER, *Le contrôle de la conformité des sanctions prévues par le Code mondial antidopage avec les principes généraux du droit suisse autonome*, in: Jusletter of 20 February 2006, at para 93.

56 The issue was vividly debated among the members of the Second Civil Court of the Swiss Federal Tribunal during the oral deliberations held on 23 August 2007 in the *Schafflützel & Zöllig* case. The reasoned decision is not published yet.

> Experience shows that, most of the time, athletes do not have a great deal of power over their federation and have to adhere to its wishes [including accepting regulations] whether they like it of not.[57]

47. Hence, the justification of a sanction by way of consent being ruled out, the decisive factor is whether the sanction may be justified by an overriding private or public interest.[58]

2.5 EC Competition Law

48. The Treaty establishing the European community ("EC Treaty")[59] contains a number of "freedoms" which it views as fundamental for the achievement of the European integration. The European Court of Justice ("ECJ") has been very proactive in enforcing these freedoms, including in sports matters.[60]

49. In the well known case of *Meca-Medina*,[61] the Court has recently held that sport in general and anti-doping regulations in particular were not immune from EC competition law. Even though the ECJ eventually dismissed the application, its decision has significant bearing on the limits of the federations' autonomy in drafting and applying their anti-doping regulations.[62]

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57 Swiss Federal Tribunal X. *[Guillermo Cañas] v. ATP Tour [& TAS]*, 4P.172/2006 Decision of 22 March 2007 ATF 133 III 235, *243*; also reported in Bull. ASA 2007, p. 592 and commented in Gazette du Palais, Les Cahiers de l'arbitrage 2007/2, p. 35 (note Pinna), in Causa Sport 2007, p. 145 (note Baddeley), and in SpuRt 2007, p. 113 (note Oschütz [p. 177]).

58 *See* below, ¶ 121. From this point of view, we disagree with the Advisory Opinion rendered by a CAS Panel according to which consent is unenforceable only if it is excessive pursuant to Article 27 CC, i.e. if it "is *evidently and grossly disproportionate* in comparison with the proved rule violation and if it is considered as a *violation of fundamental justice and fairness*" (CAS 2005/C/976 & 986, *FIFA & WADA*, Advisory Opinion of 21 April 2006 at 140-143, references omitted). It is submitted, however, that in substance that approach should not lead to substantially different results than the application of the balance of interests test set forth in the following paragraphs.

59 Consolidated versions of the Treaty on European Union and of the Treaty establishing the European community (consolidated text), Official Journal C 321E of 29.12.2006 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:pdf.

60 *See* in particular ECJ *Bosman v. Union des Associations Européennes de Football (UEFA) et al.*, Aff. C-415/93, Decision of 15 December 1995, Rec. 1995 I p. 5040; ZIP 1996, p. 42; EuGRZ 1996, p. 17; NJW 1996, p. 505 ; EuZW 1996, p. 82; SpuRt 1996, p. 59.

61 ECJ *Meca-Medina & Majcen v. Commission* C-519/04 P, Judgment of 18 July 2006, E.C.R. I-6991.

62 *See* among many others Noel BEALE, Gustaf DUHS, *Meca-Medina & Majcen; Perspectives on how to apply the EC Treaty to the rules of sporting bodies*, ISLR 2005, pp. 19-23; Stephen WEATHERILL, *Anti-doping revisited – the demise of the rule of "purely sporting interest"?*, in; ECLR 2006, p. 645 and seq., p. 652 *et seq*.; Juan DE DIOS CRESPO, *European Law: two*

50. The factual and procedural background may be summarized as follows: After proceeding before the CAS,[63] two swimmers banned for doping lodged a complaint before the EU Commission that the bans breached EC competition law, namely Articles 81 and 82 of the EC Treaty. The EU Commission dismissed the complaint on the grounds that anti-doping regulations were "based on purely sporting considerations" and therefore beyond the reach of EC competition law.[64] The Court of First Instance ("CFI") confirmed the decision of the Commission.[65]

51. The ECJ quashed the decision of the CFI. The ECJ's reasoning as to the applicability of EC competition law to sports can be summarized as follows:

- Sport is subject to EU law in so far as it constitutes an economic activity under Art. 2 of the EC Treaty. Thus the activity of both professional and semi-professional athletes falls within the scope of protection of the EC Treaty.[66]

- The mere fact that a rule is "purely sporting in nature" does not have the effect of removing the person who engages in the activity governed by that rule or the body that has enacted this rule from the scope of the EC Treaty.[67]

Swimmers Drown the "Sporting Exception", in The International Sports Law Journal, p. 118. *See* also Piermarco ZEN-RUFFINEN, Philippe SCHWEIZER, *Petite revue de jurisprudence en droit du sport*, Causa Sport 1/2007, p. 105, who are rather positive about the decision but consider that the Court has not abandoned the concept of pure sporting rules by finding that the anti-doping regulations do not fall within this category; *see* also Mark-E. ORTH, *Was hat Sport mit freiem Wettbewerb zu tun?, Bemerkungen zur EuG-Entscheidung Meca-Medina / Majcen*, in Causa sport 3/4/2004, p. 195 *et seq*., p. 198, who makes a critical analysis of the CFI's decision in that respect.

63 ECJ *Meca-Medina & Majcen v. Commission* C-519/04 P, Judgment of 18 July 2006, E.C.R. I-6991, at 10 and 13. The swimmers' appeal before the CAS had been rejected (CAS 99/A/234 & 99/A/235 *Meca-Medina v. FINA & Majcen v. FINA [I]*, reported in: Estelle de La Rochefoucauld: Recueil de jurisprudence en matière sportive, p. 38, available at http://multimedia.olympic.org/pdf/fr_report_264.pdf). After the publication of new scientific studies, the parties had agreed to submit the case to the CAS again. Thereupon, the CAS had reduced the sanctions from four to two years (CAS 2000/A/270 et 99/A/235 *Meca-Medina et Majcen v. FINA [II]*).

64 For a summary of this decision, *see* Antonio RIGOZZI, *La réglementation antidopage du Mouvement olympique et sa mise en œuvre par le Tribunal Arbitral du Sport (TAS) ne violent pas le droit communautaire de la concurrence*, in: Jusletter of 30 August 2002, *passim*.

65 CFI Decision *David Meca-Medina and Igor Majcen v. Commission des Communautés européennes*, Case T-313/02, Decision of 30 September 2004, E.C.R 1333. *See* also Antonio RIGOZZI, *Le droit de la concurrence est inapplicable en matière de dopage - Premières remarques en marge de l'arrêt du Tribunal de Première Instance des Communautés Européennes confirmant la décision de la Commission dans l'affaire Meca Medina & Majcen*, in: Jusletter of 15 November 2004.

66 ECJ *Meca-Medina & Majcen v. Commission*, case C-519/04 P, Judgment of 18 July 2006, at 22-23.

- In so far as an activity falls within the reach of the EC Treaty, the admissibility of the rules governing this activity is governed by the requirements of the EC Treaty provisions which are at stake.[68]

- Thus, if the activity is to be assessed in the light of the EC Treaty provisions relating to competition, one must examine whether the requirements for the application of Art. 81 and 82 of the EC Treaty are fulfilled.[69]

52. Article 81 of the EC Treaty provides as follows:

> 1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market […]
>
> 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

53. Article 82 of the EC Treaty provides as follows:

> Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.
>
> Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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67 *Ibid.*, at 27.

68 *Ibid.*, at 28.

69 *Ibid.*, at 30.

54. The ECJ in *Meca-Medina* examined whether anti-doping rules could meet the requirements for the application of Art. 81 of the EC Treaty. In substance, the ECJ considered that the imposition by a sports governing body of a period of ineligibility against professional (or semiprofessional) athletes could qualify as decision of an association of undertakings limiting the athletes' freedom of action within the meaning of Article 81 of the EC Treaty.

55. More specifically the Court found that, given their punitive nature and the severity of the sanctions, anti-doping rules may have detrimental effects on competition if penalties imposed on an athlete were ultimately to prove unjustified.[70] National courts have come to the same conclusion with regard to the applicability of national competition laws in respect of both undertakings (*ententes*)[71] and abuses of dominant positions.[72]

56. However, such restrictions are not necessarily unlawful. As held by the ECJ in *Meca-Medina*, a restriction to competition is not incompatible with Article 81 EC Treaty if the requirements of Article 81(3) EC Treaty are met:

> The provisions of paragraph 1 [i.e, unlawful restrictive practice] may, however, be declared inapplicable in the case of [any restrictive practice] which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.[73]

57. With specific respect to anti-doping rules, the ECJ held that the restrictions caused by such rules (in particular the imposition of a suspension) are not incompatible with

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70 This is because the athlete's exclusion that turns out to be unjustified has the effect of distorting the conditions of exercise of the activity, cf. *Ibid.*, at 47.

71 In a decision of 6 April 2006, the Regional Court (Landgericht) of Stuttgart held that rules inflicting suspensions onto athletes acting as entrepreneurs are economic activities of the sports federations, which fall within the ambit of the rules of cartels (reported in Causa Sport 3/2006, p. 391, *392*).

72 LG Köln *Lagat v. WADA & IAAF*, Decision of 13 September 2006, *passim* available at http://www.wada-ama.org/rtecontent/document/Lagat_v_WADA_IAAF_20_09_2006.pdf; for a similar reasoning under Swiss law (although not in a doping case), cf. *Football Club Sion Association et Olympique des Alpes SA c. Swiss Football League* Decision of the cantonal Tribunal of Valais reported in RVJ 2004 p. 249-262.

73 Similar justifications exist with respect to Article 82 of the EC Treaty (CFI *Piau v. Commission* T-193/02 Judgment of 26 January 2005, E.C.R. II-209).

Article 81 EC Treaty provided that (i) they pursue a legitimate objective and (ii) that the restrictions are strictly limited to what is necessary to pursue that objective.[74]

58. In the next part of this opinion we will examine Article 10.6 of the 2007 Draft Code in light of the fundamental rights of athletes set out above.

III. IS ARTICLE 10.6 OF THE CODE COMPATIBLE WITH THE FUNDAMENTAL RIGHTS OF ATHLETES?

59. We will first examine (1) whether "aggravating circumstances" are defined with sufficient precision and (2) whether the possibility to avoid increased suspension is compatible with the privilege against self-incrimination and the right to remain silent. Then (3) we will turn to the main issue raised by Article 10.6 of the 2007 Draft Code which relates to the duration of the sanction.

1. ARE "AGGRAVATING CIRCUMSTANCES" DEFINED WITH SUFFICIENT PRECISION?

60. Article 10.6 of the 2007 Draft Code provides for an extension of the otherwise applicable period of ineligibility in case of "aggravating circumstances":

> If the Anti-Doping Organization establishes in an individual […] that aggravating circumstances are present which justify the imposition of a period of Ineligibility greater than the standard sanction, then the period of Ineligibility otherwise applicable shall be increased up to a maximum of four years […]

61. The concept of "aggravating circumstances" is not defined in the provision. However, the Comment to Article 10.6 lists the following four examples of "aggravating circumstances":

> (i) the Athlete or other Person committed the anti-doping rule violation as part of a doping plan or scheme, either individually or involving a conspiracy or common enterprise to commit anti-doping rule violations;
>
> (ii) the Athlete or other Person used or possessed multiple Prohibited Substances or Prohibited Methods or used or possessed a Prohibited Substance or Prohibited Method on multiple occasions;

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[74] ECJ *Meca-Medina & Majcen v. Commission*, case C-519/04 P, Judgment of 18 July 2006, at 47 and 54.

(iii) A normal individual would be likely to enjoy the performance-enhancing effects of the anti-doping rule violation(s) beyond the otherwise applicable period of Ineligibility;

(iv) the Athlete or Person engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation.

62. Moreover and "for the avoidance of doubt", the Comment to Article 10.6 explicitly emphasizes that this list of examples of aggravating circumstances is "not exclusive and other aggravating factors may also justify the imposition of a longer period of Ineligibility".

63. The obvious question that arises is whether such an "open list" of examples is compatible with the requirement of legal certainty. Indeed, it is worth recalling that the CAS has consistently held that a sports federation cannot sanction an athlete without a proper legal or regulatory basis and that such sanctions must be predictable:

> Although we have taken pains to explain our reasoning in some detail, and although we understand that the ethical aspects of the question have given pause as to appropriate sanctioning policies – and may result in further reflection in this regard – the existing applicable texts leave us no alternative whatsoever. It is clear that the sanctions against R. lack requisite legal foundation.[75]
>
> Any legal regime should seek to enable its subjects to assess the consequences of their actions [...]. Regulations that may affect the careers of dedicated athletes must be predictable. [76]

64. It is worth mentioning that the CAS applies this "predictability test"[77] as a general principle of law applicable in doping cases without referring to any specific legal order.[78] In other words, the CAS actually applies the general principle of criminal law known as 'no crime nor punishment without law' (*nullum crinem, nulla poena sine lege*).[79]

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75 CAS JO-NAG 98/002, *Rebagliati v. IOC,* CAS Digest I, p. 419, *425*.

76 CAS 94/129, *USA Shooting & Quigley v. UIT*, CAS Digest I, p. 187, *198*.

77 *See* CAS 2001/A/330 *Reinholds v. FISA*, unreported, para. 42 and CAS 2005/A/726 *Calle Williams v. IOC*, at para. 2.5.1.3.

78 Antonio RIGOZZI, *cit. supra* Fn. 46, Nos. 1270 *et seq*., 1272.

79 It is generally accepted under Swiss law that the principle also applies as "minimum requirement" to sanctions imposed by sports governing bodies (*see* Margareta BADDELEY,

1.2 No Crime nor Punishment without (clear) Law

65. The principle *nullum crinem, nulla poena sine lege* was developed in the 18th century. In substance, it requires that the offences be clearly defined by the law and prevents the "adaptation" or extensive interpretation of an existing rule and its application to a behavior that the legislator did not intend to prohibit.

66. All modern criminal codes contain a provision implementing this principle. For instance, under the heading "No punishment without law", Article 1 of the Swiss *Code Pénal* ("CPS") provides that "punishments and other measures can be imposed only for acts explicitly sanctioned by the law".[80] A similar provision is contained in the German Criminal Code (*Strafgesetzbuch*).[81]

67. In civil law jurisdictions this requirement is often referred to as "principle of legality" (*principe de légalité*) and is considered to require that criminal offences be defined with sufficient accuracy "in order for anyone to know what behavior is prohibited".[82] In the United States the same principle is encompassed in the notion of *Due Process* as provided for by the Fifth Amendment.

68. The French and Italian criminal codes make clear that the requirement of legality applies to the definition of both (i) the prohibited conduct and (ii) the related sanction:

> No one shall be punished either for a fact which is not explicitly provided for as an offence by the law or with penalties that are not provided by the law.[83]

Überlegungen zum Miteinander von Staat und Sportorganisationen im Kampf gegen Doping, in: Sport und Recht, Basle [etc.], 2006, p. 123.

80 Free translation of the French original: *"Art. 1 (Pas de sanction sans loi) Une peine ou une mesure ne peuvent être prononcées qu'en raison d'un acte expressément réprimé par la loi."*

81 Article 1 of the German Criminal Code (*Strafgesetzbuch*) provides that *"[e]ine Tat kann nur bestraft werden, wenn die Strafbarkeit gesetzlich bestimmt war, bevor die Tat begangen wurde".*

82 Philippe GRAVEN, *L'infraction pénale punissable*, Berne, 1995, p. 22 (authors' translation).

83 Free translation of the Italian original: *"Nessuno puo' essere punito per un fatto che non sia espressamente preveduto come reato dalla lege, ne' con pene che non siano da essa stabilite."*

69. This principle is nowadays explicitly recognized as a fundamental right by all human rights instruments. As already mentioned, under the heading "No punishment without law", Article 7(1) EHRC reads as follows:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

70. According to the European Court of Human Rights, to ensure that no one should be subjected to "arbitrary prosecution, conviction and punishment" both (i) the offence and (ii) the corresponding penalty must be clearly defined by the law.[84] An analysis of the case law of the Court shows that the concept of "clearly defined by the law" boils down to a foreseeability test.[85] This test is satisfied:

> where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what act and omissions will make him criminally liable"[86].

71. For the purpose of the present opinion the obvious question is whether the definition of "aggravating circumstances" in Article 10.6 of the 2007 Draft Code meets this foreseeability or predictability test. Indeed, it could be argued that such principle applies not only to the definition of the constitutive elements of the offence (including qualified offence)[87] but also to aggravating circumstances.[88]

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84 ECHR *Custers, Deveaux & Turk v. Denmark*, Nos. 11843/03, 11847/03 & 11849/03, Judgment of 3 May 2007, at 76. *See* also Walter GOLLWITZER, *Menschenrechte im Strafverfahren, MRK und IPBPR - Kommentar*, Berlin 2005, ad art. 7 EMRK / 15 IPBR, n° 1; Stefan TRECHSEL, *Schweizerisches Strafrecht*, AT/Teil I (6th ed.), Zurich [etc.] 2004, p. 53.

85 See for instance ECHR *Jorgic v. Germany* No. 74613/01, Judgment of 12 July 2007, at 100: "When speaking of 'law' Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises as written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability".

86 ECHR *Jorgic v. Germany*, No. 74613/01, Judgment of 12 July 2007, at 100.

87 For Swiss law *see*, for instance, Stefan DISCH, *L'homicide intentionnel,* Lausanne, 1999, p. 363.

88 French commentators insist on the fact that the law define not only the elements of the aggravating circumstances but also the foreseeable penalty (Camille DE JACOBET DE NOMBEL, *Théorie générale des circonstances aggravantes*, Thèse, Bordeaux, 2004, p. 4)

72. Some critical concerns have already been expressed.[89] For instance, during the consultation process, the International Rugby Board ("IRB") made the following recommendations:

> It would be helpful for WADA to provide clarification […] in respect of the manner in which fault should be assessed and evaluated in the context of sanctions and also how (if at all relevant) aggravating […] factors should be applied.[90]

73. Article 10.6 of the 2007 Draft Code raises three issues with respect to the principle *nullum crinem, nulla poena sine lege*: whether it is admissible to define the concept "aggravating circumstances" only in the Comments to the Code (*see* below b), whether it is admissible to define the concept of "aggravating circumstances" by referring to an open list of examples (*see* below c) and whether the list of examples contained in the Comment to Article 10.6 ensures sufficient foreseeability (*see* below d).

1.3 Should "Aggravating Circumstances" be Indicated in Article 10.6 itself?

74. While in the previous drafts of Article 10.6, the aggravating circumstances allowing the increase of the suspension were specified in the text of that article,[91] the current wording of Article 10.6 contains no indication of what may constitute an aggravating

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89 See for instance *"WADA: Aggravating circumstance"* posted on 17 October 2007 on www.wadawatch.blogspot.com: "WADAwatch simply wants it on the record, that WADA has published this same clause three times this year, without determining the need to add 'Aggravating Circumstances' to its list of definitions. […] If it does not do so, endless arbitrations will indubitably ensue from the ambiguity that arises."

90 Feedback on Code 2007: Draft Version 2.0 ad Article 10.5, p. 7, available at http://www.wada-ama.org/rtecontent/document/c3Article10.pdf.

91 The first draft read as follows*: "If the Anti-Doping Organization establishes in an individual case involving an anti-doping rule violation other than violations under 2.4 (Whereabouts and Missed Tests), 2.7 (Trafficking) and 2.8 (Administration) that: (a)The Athlete intended to enhance his or her sport performance or the other Person intended to enhance the performance of an Athlete, and (b) One or more other factors are present which justify the imposition of a period of Ineligibility greater than the standard sanction, such as: the Athlete or other Person committed the anti-doping rule violation as part of a larger doping scheme; the Athlete or other Person used or possessed multiple Prohibited Substances or Prohibited Methods, or used or possessed a Prohibited Substance or Prohibited Method on multiple separate occasions; a normal individual would be likely to enjoy the performance-enhancing effects of the anti-doping rule violation(s) beyond the otherwise applicable period of Ineligibility; the Athlete or Person engaged in fraudulent or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation; then the period of Ineligibility otherwise applicable shall be increased up to a maximum of four years. […]"* (*see* Article 10.6 of WADA 2007 Code Version 1 (which is similar in effect to Version 2), available at http://www.wada-ama.org/rtecontent/document/WADA_Code_Version_1.0.pdf).

circumstance. The list of examples that may justify the imposition of a longer period of ineligibility is found in the Comment to Article 10.6:

> *[Comment to Article 10.6: Examples of aggravating circumstances which may justify the imposition of a period of Ineligibility greater than the standard sanction are: the Athlete or other Person committed the anti-doping rule violation as part of a doping plan or scheme, either individually or involving a conspiracy or common enterprise to commit anti-doping rule violations; the Athlete or other Person used or possessed multiple Prohibited Substances or Prohibited Methods or used or possessed a Prohibited Substance or Prohibited Method on multiple occasions; a normal individual would be likely to enjoy the performance-enhancing effects of the anti-doping rule violation(s) beyond the otherwise applicable period of Ineligibility; the Athlete or Person engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation. […]]*

75. Is this compatible with the foreseeability requirement of *nullum crinem, nulla poena sine lege*? The answer depends on the nature of the Comments to the Code. While some doubts may have been possible under the 2003 Code, Article 24.2 of the 2007 Draft Code makes clear that:

> The comments annotating various provisions of the Code shall be used to interpret the Code.

76. Moreover, according to Article 23.2.2 of the Code, Article 10.6 is among "the Articles (and corresponding Comments)" that "must be implemented by Signatories without substantive change". Hence, the sports governing bodies are required to implement both the Article 10.6 and the corresponding comment. To the extent they do so, we believe that the fact that the aggravating circumstances are not defined in the text of Article 10.6 does not breach the principle *nullum crinem, nulla poena sine lege*. From the point of view of foreseeability, it does not make a real difference whether the list of examples is included in the article itself or in the comment accompanying that article.

77. Hence, we conclude that the mere fact that the examples of "aggravating circumstances" are included in the Comments to Article 10.6 and not in the Article itself does not constitutes a violation of the *nullum crinem, nulla pena sine lege certa*.

78. Indeed, according to the European Court of Human Rights, it is not necessary that the requirement of foreseeability derive *in toto* from the rule itself. It can also be met

through judicial interpretation,[92] which often relies on official comments made by the drafters of the rules (*travaux préparatoires*).

1.4 Is an Open List of "Aggravating Circumstances" Admissible?

79. The next issue concerns the fact that the indication of what constitutes an aggravating circumstance is an open list of examples:

> *[Comment to Article 10.6: For the avoidance of doubt, the examples of aggravating circumstances described in this Comment to Article 10.6 are not exclusive and other aggravating factors may also justify the imposition of a longer period of Ineligibility. (…)].*

80. The rationale for such an open list of examples is illustrated in the consultation process by the comments of the International Association of Athletics Federations (IAAF) on 2 April 2007, according to which:

> […] the current formulation of Article 10.6 [i.e. Version 1] is too restrictive and, as a consequence, […] there is a risk that aggravated cases that could and should be punished with an increased sanction might not fall strictly within the relevant criteria in Article 10.6, thereby undermining the purpose and effect of the new provision. […]
>
> [t]he IAAF's view is that it must be made clear in Article 10.6(b) that the list of examples of "aggravating circumstances" is a non-exhaustive list and that the Anti-Doping Organisation concerned may seek increased sanctions if other examples of "aggravating circumstances" were to arise on a case by case basis.[93]

81. As a matter of principle, one could ask whether the very principle of an open list (to be completed on a case by case basis) is compatible with the requirements of foreseeability. That said, event in the most codified legal fields, including criminal law, rules of law are by nature general and abstract. However clearly drafted as they may be, such rules entail an inevitable element of interpretation, or in the words of the

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92 ECHR *Müller and others v. Switzerland*, No. 10737/84, Judgment of 24 May 1988, at 29, where the Court that found that the Swiss Federal Tribunal's consistent case law could supplement the very broadly formulated provision of criminal law.

93 *See* Feedback on Code 2007 (Draft Version 1.0) ad art. 10 ; available at http://www.wada-ama.org/rtecontent/document/c2Article10.pdf.

European Court of Human Rights, "[t]here will always be a need for elucidation of doubtful points and for adaptation to changing circumstances".[94]

82. Moreover, the degree of precision that one may expect from a legal provision has to be balanced with other considerations, as, for instance, the technical nature of the regulations or the mutability of the phenomenon concerned.[95] Indeed, the European Court of Human Rights has consistently ruled that absolute precision is not always required, nor even desirable. A certain degree of flexibility may be necessary to ensure the effectiveness of the provision, in particular in the future:

> The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague.[96]

83. Furthermore, the European Court of Human Rights considers that the foreseeabililty test may be more or less stringent depending on the area of law concerned[97]. In particular lower standards apply in areas where, by nature, the practice is subject to continuous evolution.[98] This is for example the case in the field of business crimes.[99]

84. Finally, the European Court of Human Rights also takes into account the specificities of the addressees of the rule the foreseeability of which must be assessed.[100] For instance, in cases where the rule is applied to professionals used to exercise a high degree of care in performing their work, the Court considers that one may expect those

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94 *See* inter alia ECHR *Jorgic v. Germany*, No. 74613/01, Judgment of 12 July 2007, at 101.

95 Charles-Albert MORAND, *La légalité de la légalité*, in: Figures de la légalité, Publisud 1992, p. 185 ss, p. 195.

96 ECHR *Kokkinakis v. Greece*, No. 14307/88, Judgment of 25 May 1993, at 40.

97 ECHR *Baskaya and Okçuoglu v. Turkey*, No. 23536/94, Judgment of 8 July 1999, at 39, concerning propaganda in an anti-terrorist act: "The Court recognizes that in the area under consideration it may be difficult to frame laws with absolute precision and that a certain degree of flexibility may be called for to enable the national courts to assess whether a publication should be considered separatist propaganda against the indivisibility of the State".

98 Sébastien VAN DROOGHENBROECK, *La proportionnalité dans le droit de la convention européenne des droits de l'homme – prendre l'idée simple au sérieux*, Bruxelles 2001, p. 676.

99 Robert ROTH, *Exposé du 10 mai 1994 sur la légalité en droit pénal accessoire*, in: Office fédéral du personnel (edit.), Principe de la légalité: colloque 1994 sur le droit public et administratif, Bern, 1994, p. 47 ss, p. 56.

100 ECHR *Dragotoniu et Militaru-Pidhorni c. Roumanie*, No. 77193/01 & 77196/01 Judgment of 24 May 2007, at 35.

professionals to pay special attention to the evaluation of the risks inherent to their activities, if need be by seeking specific advice.[101]

85. The same rationale clearly applies in anti-doping matters as it is beyond doubt that:

- doping techniques and methods to avoid the detection of those techniques are constantly evolving and the anti-doping authorities will almost inevitably remain "a step behind" the cheaters;
- doping techniques and methods are increasingly sophisticated; and
- professional athletes are required to be particularly prudent in assessing the risks related to the use of substances and/or methods.

86. For all these reasons, doping can fairly be considered as an area in which the exhaustive enumeration of "aggravating circumstances" could seriously undermine the effectiveness of the system. Moreover, athletes who cheat cannot ignore that they are taking the risk of being severely sanctioned. It is submitted that the only specific risk that the athletes can possibly ignore is the exact length of a possible suspension. It is submitted that such a risk is acceptable.

87. In light of the above development, we conclude that an open list of aggravating circumstances is, as such, compatible with Article 7 EHRC.

1.5 Does the (Open) List of "Aggravating Circumstances" Ensure Foreseeability?

88. The fact that open lists are admissible under Article 7 EHRC does not mean that an anti-doping organization is completely free to decide what constitutes "aggravating circumstances". For instance, it is clear that it would be inadmissible for an anti-doping organization to impose a four-year ban on the ground that the athlete concerned has publicly criticized the organization.

89. Where should one draw the line? According to the European Court of Human Rights, "the gradual clarification of the rules of criminal liability through judicial interpretation from case to case" is compatible with Article 7 EHRC, "provided that the resulting

[101] ECHR *Pessino v. France*, No. 40403/02, Judgment of 10 October 2006, at 33.

development is consistent with the essence of the offence and could reasonably be foreseen".[102]

90. It will be the task of the adjudication bodies and in particular of the CAS to determine on a case by case basis if the athlete could reasonably predict that the circumstances at hand could qualify as "aggravating circumstances" within the meaning of Article 10.6.

91. In some cases the answer will be straightforward, in particular when the drafting history gives clear indications. For instance, because of the deletion of subparagraph (a) of versions 1[103] and 2[104], it is clear that the intention to enhance performance is not in-and-of-itself an aggravating circumstance.

92. In other cases, the answer may be less obvious and the CAS will have to resort to a predictability test by identifying the essence of the concept of aggravating circumstances. Doing so, it may find a first indication in the fact that Article 10.6 of the 2007 Draft Code is inapplicable when the athlete "can prove to the comfortable satisfaction of the hearing panel that he did not knowingly violate the anti-doping rule". This provision makes it clear[105] that cheating is an important element of the notion of aggravating circumstances. However, the mere fact of cheating alone is not sufficient. Additional elements are required.

93. The essence of the concept of aggravating circumstances is thus a qualified kind of cheating, which involves an additional element. When looking at the list of examples provided in the Comment of Article 10.6 of the 2007 Draft Code, it appears that the essence of this additional element is twofold:

(i) *the idea of repetition and/or plurality*. This is evident from the wording of the first two examples, *i.e.* "the Athlete or other Person committed the anti-doping rule violation as part of a doping plan or scheme, either individually or involving a conspiracy or common enterprise to commit anti-doping rule violations" and "the Athlete or other Person used or possessed multiple Prohibited Substances or

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102 ECHR *Radio France and others v. France*, No 53984/00, Judgment of 30 March 2004, at 20.

103 *See* above Fn. 91.

104 *See* Redline comparison between 2007 Code Version 3.0 and 2.0 available at http://www.wada-ama.org/rtecontent/document/WADA_Code_2007_Redline_3.0_to_2.0.pdf.

105 Similar indications can be found in the drafting history. *See* for instance Minutes of the WADA Foundation Board Meeting of 13 May 2007, p. 26; Minutes of the WADA Executive Committee Meeting of 12 May 2007, p. 31.

Prohibited Methods or used or possessed a Prohibited Substance or Prohibited Method on multiple occasions",[106] or

(ii) *the idea of frustration*. This idea is evident from the third and fourth examples, *i.e.* "enjoy the performance-enhancing effects of the anti-doping rule violation(s) beyond the otherwise applicable period of Ineligibility" and "deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation".

94. It is difficult to anticipate in the abstract all the circumstances that may be considered as aggravating in light of these ideas. Without prejudging future CAS case law, one could think of an athlete who commits one or more additional offence(s) before the moment at which he received notice of the first offence so that, according to Article 10.7.4, he or she will be considered as having committed only a first offence.

95. In this example, the two ideas underlying the essence of the concept of aggravating circumstances are both present. Again, without prejudice to the further development of the notion by the CAS, it does not appear necessary, however, that both ideas be present. A situation in which only one of the two underlying ideas is present (either repetition/plurality or frustration) may also constitute a sufficient basis to apply Article 10.6.

96. For the avoidance of doubt, we wish to emphasize that the preceding developments merely seek to illustrate how the predictability test may possibly be implemented. They should not be understood as ruling out the extension of the list of aggravating circumstances to other instances of cheating unrelated to the two ideas identified above, provided foreseeability is established on another basis.

97. As already mentioned (*see* above ¶¶ 63-64), in the past, CAS panels have carefully carried out such predictability test in doping cases and duly taken into consideration the athletes' rights in that respect. Should a lower adjudicating body apply the foreseeability test in a way that is not consistent with the athletes' fundamental rights, one may expect CAS to restore fairness on appeal.

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[106] The same idea is implicit in the third example since one fails to see how an athlete could "enjoy the performance-enhancing effects of the anti-doping rule violation(s) beyond the otherwise applicable period of Ineligibility" without resorting to multiple violations.

2. IS THE ROLE OF ADMISSION COMPATIBLE WITH THE PRIVILEGE AGAINST SELF-INCRIMINATION AND THE RIGHT TO REMAIN SILENT?

98. According to Article 10.6(2) of the 2007 Draft Code, an athlete can avoid the imposition of an increased sanction for aggravating circumstances by promptly admitting the anti-doping rule violation he or she is confronted with. As already mentioned, this provision – as well as other similar provision in the Draft Code – can be questioned in light of the privilege against self-incrimination and the right to remain silent (the so-called *nemo tenetur* principle).

99. As an introductory matter, one should remember the view currently prevailing pursuant to which the procedural guarantees that human rights instruments afford in criminal matters are not directly applicable in doping adjudication proceedings. This view has been held by U.S. Courts with respect to the right to refuse to testify for fear of self-incrimination under the Fifth Amendment to the U.S. Constitution.[107]

100. That said, consistent with the general approach of this opinion, we well assume that the *nemo tenetur* principle applies in doping disputes and assess the validity of Art. 10.6 of the Code accordingly.

101. As already mentioned, this principle is set forth in Article 14(3)(g) UNCCR, which guarantees the right "[n]ot to be compelled to testify against himself or to confess guilt." In a clear line of cases, the European Court of Human Rights has held that:

> although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6. […] The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention (art. 6-2).[108]

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107 While it is undisputed that in criminal proceeding no adverse inference may be drawn from a witness pleading the Fifth, a AAA arbitration Panel has considered that this rules does not apply in a doping hearing (*USADA v. Collins* AAA No. 30 190 00658 04, Award of 9 December 2004, para. 3.8-9 available at http://www.usantidoping.org/what/management/arbitration.aspx, referring to U.S. case law ruling out the application of the fifth in civil actions (*Baxter v. Falmigiana*, 425 U.S., 308, 318 (1976)) and in disciplinary hearings (*In re Disciplinary Proceedings Against Schalow*, 131 Wis. 2d 1, 14 (Wis. 1986)).

108 ECHR *Saunders v. United Kingdom*, No. 19187/91, Judgment of 17.12.1996, at 68.

102. The *nemo tenetur* principle does not only give the right to remain silent and not to collaborate with the prosecution but also prohibits the use of indirect pressure on the accused person in order to make him/her collaborate. This guarantee is generally analyzed under the two following aspects: (a) the threat of an autonomous sanction for exercising the right not to incriminate oneself and (b) the promise of penalty reduction and/or drop of charges in exchange for a complete confession, the so-called plea bargain.

2.2 Threat of an Autonomous Sanction

103. The European Court of Human Rights has quashed several national decisions on the ground that they were the result of a threat of a separate criminal sanction (fine, imprisonment but also disciplinary sanctions) in cases of a refusal to provide evidence to the investigators or to answer questions. [109]

104. This being so, a rule encouraging disclosure to the authorities under the threat of penalty does not *per se* infringe *nemo tenetur*.[110] Whether a violation of the principle actually occurs, depends on the degree of compulsion of such threatening rule. The European Court of Human Rights has held that a violation can occur in particular if the rule at stake in effect destroys the very essence of the privilege against self-incrimination and the right to remain silent,[111] taking into account the severity of the penalty[112] and the judicial safeguards set up to ensure fairness.[113]

105. At first sight, Article 10.6(2) of the 2007 Draft Code may seem problematic given the significance of the potential impact on the sanction, *i.e.* up to twice the otherwise applicable suspension. On a closer look, however, it is clear that Article 10.6(2) is unproblematic in light of the above case law. In support of this view, it suffices to mention the two following reasons: (i) the purpose of Article 10.6(2) is to prompt a

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109 *See* the case law overview in ECHR *Quinn v. Ireland* No. 36887/97 Judgment of 21.12.2000, at 47 *et seq*.

110 Karen REID*, A practitioner's guide to the European Convention on Human Rights*, 2nd ed., London 2004, IIA-175.

111 ECHR *Quinn v. Ireland*, Judgment of 21.12.2000, at 47 *et seq*.

112 REID, *cit supra* Fn. 110, at IIA-175. For instance, the Court held that a maximum fine of GBP 300 was not improper, as opposed to a two year prison sentence (ECHR *Allen v. United Kingdom* No. 76574/01, Decision of 10 September 2002, at 1).

113 Clare OVEY, Robin WHITE, *The European Convention on Human Rights*, 4th ed., Oxford 2006, p. 199.

confession, not to collect potentially incriminating materials for the investigations, and (ii) the "threat" is not that of an additional penalty, but of the loss of a possible "discount".

106. On the other hand, it is undisputable that Article 10.6 contains an element of plea bargain.

2.3 Plea Bargain

107. In a plea bargain, the defendant agrees to plead guilty, usually to a lesser charge than the one for which he/she would otherwise stand trial, in exchange for a more lenient sentence than that possible for the graver charge.

108. The rationale behind these mechanisms is procedural economy or efficient administration of justice.[114] In doping matters, like in ordinary criminal law, the resources of the prosecution are limited and should thus be used in an efficient way. To the extent that it allows the reduction of litigation related costs,[115] Article 10.6 appears to pursue a legitimate aim.

109. Some continental commentators have expressed skeptical views as to the compatibility of plea bargaining with the EHRC and expressed concern about the fact that the confession is prompted exclusively by the promise of a reward.[116] It has also been pointed out that the promise of a reward implies a threat of increasing the sanction in case of a refusal to cooperate.[117]

110. In spite of this skepticism, for certain types of offences, several countries on this Continent have adopted systems which are in effect very similar to plea bargaining.[118] For instance, the new Italian Code of Criminal Procedure ("CPPI") contemplates a system named *applicazione della pena su richiesta delle parti* (application of the

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114 Barron's Law Dictionary, Fifth Edition, p. 378.

115 Minutes of the WADA Executive Committee Meeting of 19 November 2006, p. 29 referring to the notorious fact that some athletes, particularly wealthy athletes, consider that they have nothing to lose by putting forward all imaginable defenses in the hope that one or the other may work with the result that anti-doping organizations spend significant amounts of money defending the validity of clear laboratory results.

116 *See* for instance the overview given by Robert BRAUN, *Strafprozessuale Absprachen im abgekürzten Verfahren, „Plea bargaining" im Kanton Basel-Landschaft?*, Liestal, 2003, p. 37 ss.

117 Niklaus OBERHOLZER, *Absprachen im Strafverfahren, pragmatische Entlastungsstrategie oder Abkehr vom strafprozessualen Modell?*, Révue pénale suisse 1993 p. 157 ss, p. 171.

118 Maximo LANGER, *The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, Harvard International law Journal, Vol. 45, Number 1, 2004, p. 39..

sentence at the request of the parties), according to which the parties may request that the judge, at any time prior to trial, accept their negotiated agreement concerning the appropriate sentence (Articles 444-448 CPPI).[119] A similar mechanism exists in the French Code of Criminal Procedure ("CPPF"): under the denomination *"comparution sur reconnaissance préalable de culpabilité"*, Article 495-7 allows the public prosecutor to propose a reduced sanction to a person who is suspected of relatively minor offences and recognizes having committed the offence.[120] Along the same lines, the German Code of Criminal Procedure ("stop") allows the defendant to make an offer to confess in exchange for a guarantee by the judge that the sentence will not exceed a certain limit or that certain charges will not be pursued (Article 153A StPO).

111. In a case of 1972, the (former) Commission of Human Rights held that the English plea bargaining system was not inadmissible as such under the Convention:

> The Commission, having examined this practice in the context of English criminal procedures and also the other systems among those States Parties to the Convention where a similar practice is found, is satisfied that the practice as such is not inconsistent with the requirements of Article 6 (1) and (2) of the Convention. In arriving at this conclusion, the Commission has had regard to the rules under which the practice operates and in particular to the safeguards which are provided to avoid the possibility of abuse.[121]

112. Of course, one cannot entirely rule out the risk that an anti-doping organization may abuse the process and threaten to charge an athlete with an aggravating circumstance in order to obtain a confession.[122] However, should an athlete consider that he or she has been put under undue pressure to plead guilty, he or she would have the right to complain in front of the CAS. We believe that access to an independent arbitral tribunal like the CAS[123] constitutes a sufficient safeguard within the meaning of the EHRC.

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119 See Jeffrey J-MILLER, *Plea Bargaining and its analogues under the new Italian criminal procedure code and in the United States*, International Law and politics, vol 22:215, p. 229. This procedure, which is limited to offences involving only pecuniary fines or prison terms of less than two years, allowed the judge to reduce the sentence up to one-third (article 44(1) CPPI).

120 Moreover, Article 41-2 CPPF provides for a special procedure, called "*composition pénale*", if the defendant recognizes the commission of an offence.

121 *X v. the United Kingdom* No. 5076/71, Decision of 23 March 1972, at 2.

122 Martin KILLIAS, *Précis de droit pénal général*, Bern, 2001, p. 125.

123 On the independence of CAS, *see* Swiss Federal Tribunla *Lazutina & Danilova v. IOC, FIS & TAS*, 4P.267-270/2002, Decision of 27 May 2003; ATF 129 III 425 ; Bull ASA 2003, p. 601; JDI 2003, p. 1096, note Plantey (p. 1085) ; SpuRt 2004, p. 38, note Netzle; SchiedsVZ 2004, p. 28, note Oschütz ; Yearbook of Commercial Arbitration 2004, p. 206.

Moreover, in the unlikely event that a CAS Panel upholds such unfairness, it is our opinion that the CAS award could be set aside by the Swiss Federal Tribunal on the ground of violation of public policy.[124]

3. IS AN INELIGIBILITY PERIOD OF MORE THAN TWO YEARS COMPATIBLE WITH THE FUNDAMENTAL RIGHTS OF ATHLETES?

113. Article 10.6 of the Revised Code stipulates that an ineligibility period of "up to a maximum of four years" can be imposed for a first doping violation in case of aggravating circumstances.

114. In Section II.2 above, we have stated that the imposition by a sports governing body of an ineligibility period of two years (and *a fortiori* a longer suspension) constitutes a restriction of the athletes' personal liberty under Article 8 EHRC and similar constitutional provisions (*see* above ¶¶ 28-29) and personality rights within the meaning of Article 28 CC (*see* above ¶¶ 40 *et seq*.). For professional or semi-professional athletes, the imposition of such a ban would also entail an infringement of their right to work guaranteed by Article 6 of the UNCSR and similar constitutional provisions as well as a restriction of competition within the meaning of Article 81 CE (*see* above ¶¶ 48 *et seq.*).

115. In the next paragraphs, we will examine whether these restrictions are admissible at law based upon the relevant conditions that justify the restrictions to athletes' fundamental rights.[125]

3.2 The Unproblematic Condition: Legitimate Aim

116. The first condition to justify a restriction of the athletes' fundamental rights is that such restriction pursues a legitimate aim.

117. As already discussed in the First Opinion,[126] the pressing need for anti-doping regulation is generally recognized.[127] The unanimous adoption and rapid ratification of

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124 On the role of public policy as a ground to set aside CAS awards, *see* Antonio RIGOZZI, *cit. supra* Fn. 46, Nos. 1385 *et seq.* 1410 *et seq*.

125 *See* First Opinion at ¶¶ 78-79. While in classical human rights theory and practice, a restriction of human rights by the State must aim at protecting a legitimate public interest, in private anti-doping disputes the relevant interest is the one pursued by the private body issuing the anti-doping regulations.

126 First Opinion, ¶¶ 146-151; RIGOZZI/KAUFMANN-KOHLER/MALINVERNI, *cit*. *supra* Fn. 1, pp. 60-61.

the UNESCO Convention against doping, which entered into force on 1st February 2007, reinforces that observation (*see* above ¶¶ 16-19).[128] Indeed, the issue was not even discussed in *Meca-Medina*:

> As regards the overall context in which the rules at issue were adopted, the Commission could rightly take the view that the general objective of the rules was, as none of the parties disputes, to combat doping in order for competitive sport to be conducted fairly and that it included the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport.[129]

118. The Comment to Article 10.6 does not set out the reasons for adopting an increased penalty in case of aggravating circumstances. The rationale of this new provision can be clearly gathered from WADA's Q&A on the Code review and consultation process:

> Two general themes emerge – *firmness and fairness – both targeted at strengthening the fight against doping in sport*.
>
> - A draft provision calls for the increase of sanctions in doping cases involving certain "aggravating circumstances" such as being part of a large doping scheme, the athlete having used multiple prohibited substances, or the athlete engaging in deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation.
> - At the same time, a greater flexibility would be introduced as relates to sanctions in general. While this flexibility would provide for enhanced sanctions, for example in cases involving aggravating circumstances (see above), lessened sanctions would be possible where the athlete

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127 Udo STEINER, *Doping aus verfassungsrechtlicher Sicht*, in: Röhricht/Vieweg (Ed) Doping-Forum, Stuttgart [etc.], 2000, p. 131. Referring specifically to the admissibility of fundamental rights restrictions by anti-doping provisions, Justice Steiner expressly mentioned the athletes' health, the reputation of sports and the fairness of the competition.

128 *See* also Paul DAVID, *The World Anti-Doping Code - The Fight For The Spirit Of Sport*, 14th Commonwealth Law Association Conference 12 September 2005, London [Liabilities and obligations of event organisers, sporting bodies and participants and of referees], ¶ 44: "The fundamental points [referred to in our First Opinion at ¶¶ 146-150] which have made such challenges difficult will, it is submitted, apply with greater force where the Code applies because the various international agreements supporting the Code provide a strong policy justification for any infringement of the athlete's individual freedoms"; available at http://www.pauldavid.co.nz/doclibrary/public/papers/Paper-THEWORLDANTI-DOPINGCODE-THEFIGHTFORTHESPIRITOFSPORT.pdf.

129 ECJ Decision *Meca-Medina & Majcen v. Commission*, case C-519/04 P, judgment of 18 July 2006, at para. 43

> can prove that the substance involved was not intended to enhance performance. […][130]

119. Several statements made by WADA either before or during the revision and consultation process confirm that the purpose of Article 10.6 is to improve the effectiveness of the fight against doping,[131] in particular, by providing harsher sanctions in cases of serious offences. In its current version, the Code already considers recidivism as a specific aggravating circumstance by providing for different sanctions for first, second and third anti-doping rule violations. The aim of the new Article 10.6 is to make a distinction between "ordinary" first violations and "severe" first violations.

120. The fight against doping being a legitimate aim, it is clear that a provision aiming at reinforcing the effectiveness of such fight also qualifies as legitimate. Hence, the first condition for justifying a possible restriction of the athletes' personal liberty and right to work as well as a possible restriction of the athletes' rights under EC competition law is met.

121. With respect to the athletes' personality rights under Article 28 CC, this legitimate aim shall be weighed against the athletes' interests. This weighing process is essentially respected in the proportionality test which is required to allow restrictions to human rights.[132]

3.3 The Real Issue: The Proportionality Test

122. Further, a restriction of an athlete's personal liberty and right to work is justified if it is further proportionate to the (legitimate) aim pursued.[133] Proportionality is also required

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130 Q&A: World Anti-Doping Code Review & Consultation (Updated: October 15, 2007), p. 4, available at http://www.wada-ama.org/rtecontent/document/QA_Code_Consultation_En.pdf - emphasis added.

131 *See* Minutes of the WADA Foundation Board Meeting of 13 May 2007, p. 26, where the Chairman made it clear that "flexibility at the low end was matched by moving to four years for aggravated offences, so WADA was getting tougher when it came to the bad people rather than those who were the victims of accidents."

132 SCHMID, *cit. supra* Fn. 55, p. 142: "Through the concept of "balance of interests", which includes the principles of proportionality and procedural fairness, the provisions on the protections of personality rights implement in private law concepts which were originally developed within the relationship between the State and the individuals. *Accordingly, as a matter of fact, personality rights constitute in fact the application of human rights among private persons*" (loose translation of the German Original).

133 AUER/MALINVERNI/HOTELLIER, *cit. supra* Fn. 21, No 2.

by the ECJ to justify anti-competitive effects arising out of the imposition of a doping ban:

> It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives […] and are proportionate to them.[134]

123. From court decisions in sports and doping matters, it is clear that proportionality plays the predominant role in assessing the validity of restrictive doping regulations. As already pointed out in the First Opinion, proportionality is not only the paramount condition for the validity of restrictions to fundamental rights, it is also a general principle of law governing the imposition of sanctions of any disciplinary body, whether it be public or private.[135] In the following paragraphs, we will analyze whether Article 10.6 complies with the principle of proportionality in its three traditional limbs, i.e. capacity (aa), necessity (bb) and stricto sensu proportionality (cc).

aa) Capacity

124. Generally also referred to with the German term "*Geeignetheit*", the condition of capacity requires that the restriction be suitable to achieve the aim it pursues.

125. In order to be capable of achieving the aim of effectively promoting the fight against doping, the imposition of a suspension must have a deterrent effect for athletes. As already mentioned in the First Opinion, it is obvious that, as a matter of principle, the risk of a long suspension is, in general, a significant deterrent for doping offences for most athletes.[136] By way of analogy, it is fair to say that the risk of a longer suspension in case of a severe offence is capable of deterring athletes from committing such more serious offences.

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134 ECJ Decision of 18 July 2006*, Meca-Medina & Majcen v. Commission*, case C-519/04 P, at para. 42 *in fine* references omitted. Similarly, the Stuttgart Regional Court (*Landgericht*) held that the determination of inadmissible impediment to competition requires a balance of interests and the application of the proportionality principle (reported in Causa Sport 2006, p. 391, *393-394*).

135 First Opinion, ¶¶ 80-83; RIGOZZI/KAUFMANN-KOHLER/MALINVERNI, *cit. supra* Fn. 1, pp. 50-51.

136 *Id.*, ¶ 154.

bb) Necessity

126. The requirement of necessity implies that no less intrusive restrictions are equally suitable to achieve the aim.[137]

127. One cannot seriously dispute that the imposition of an ineligibility period is necessary to deter athletes from committing anti-doping offences and thus one cannot dispute the efficiency of anti-doping regulations. Indeed, the Courts have consistently ruled that the suspension is by its very nature the only effective sanction in this respect. For instance, the Ontario Court of Justice justified the life ban imposed on *Ben Johnson* with the reason that sufficiently severe sanctions are necessary to deter the use of doping.[138]

128. One could think that the imposition of a pecuniary sanction could be a less intrusive way to achieve effectiveness. However, as the effectiveness of pecuniary sanctions will depend on the financial situation of the athlete concerned, the only way to pursue effectiveness without jeopardizing equal treatment is the imposition of an ineligibility periods. Indeed, in the *Baumann* case, the Frankfurt High Regional Court emphasized that "an effective deterrent can only be implemented by way of imposition of a suspension and related financial effect of the athlete".[139]

129. Moreover, CAS arbitrators have made it clear that they consider it to be necessary to introduce a provision that would give them the ability to go beyond the ordinary two-year suspension in case of extraordinary circumstances.[140]

130. As a final matter, it bears noting that the athletes themselves generally consider that longer period of ineligibility are necessary. For instance,[141] with regard to Article 10.6 of

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137 Jens ADOLPHSEN, *Internationale Dopingstrafen*, Tübingen, 2003, p. 204.

138 *Johnson v. Athletic Canada and IAAF*, [1997] O.J. No. 3201, para. 31. In justifying the imposition of a lifetime ban following a second doping offence, the Court appears to have accepted the following opinion expressed in the Report of the Dubin Inquiry in respect of sport organization penalties: "Briefly stated, if the rewards for a cheater even when caught are greater than for the obeying the rules, cheating will continue. […] An effective penalty should ensure that there are greater disadvantages than advantages in cheating".

139 OLG Frankfurt a. M. *Baumann v. IAAF*, Decision of 2 April 2002, SpuRt 2002 p. 245, 250 (free translation of the original German text: *"Eine Sperre von zwei Jahren Dauer, […] hält die Kammer bei einem Erstverstoss nicht für unangemessen lang."*).

140 Richard MCLAREN, *CAS Doping Jurisprudence: what can we learn?*, ISLR 2006, p. 21.

141 See for instance Paula Radcliffe's recent declarations in the press reported in: Charles FLINT, Jonathan TAYLOR and Adam LEWIS, The Regulation of Drug Use in Sport, in Adam Lewis and Jonathan Taylor (ed.), Sport: Law and Practice, London 2003, E.4.9, p. 911. *See* also Doping Control: The National Governing Body Perspective, in: Sport: Socio-Legal Perspectives, London-Sydney, 2001, pp. 26-27; Olivier NIGGLI & Julien SIEVEKING, *Éléments choisis de*

the 2007 Draft Code, the WADA's Athlete Committee recently called for increasing the sanction for a first-time serious doping offence from two to four years "in order to deter cheating and take cheaters out of competition".[142]

131. From this point of view, one cannot seriously disagree with Justice Rouiller's remark that:

> If the athletes themselves think, rightly, that this system is appropriate and necessary, that hardly leaves any room for criticizing it from the angle of proportionality as such.[143]

cc) Proportionality stricto sensu

132. With respect to proportionality in its strict sense, we concluded our First Opinion by stating that a two-year ban for a first doping offence is not disproportionate in-and-of-itself, considering the compelling need to ensure harmonization. In our view, a more lenient sanction for a first offence is likely to seriously jeopardize the effectiveness of the fight against doping. In other words, while we did not ignore that in some circumstances a two-year sanction could appear as a very harsh sanction, we considered that this is the "price to pay" to ensure harmonization and effectiveness.

133. In the present opinion, we will first examine whether the maximum four years of ineligibility is disproportionate in case of aggravating circumstances.

134. This duration may appear to raise difficulties in the light of the well known decision of the Munich Regional Court in the *Krabbe* case refusing to uphold a four-year suspension for a first offence given the dramatic impact of a four-year sentence on an athlete's career and considering that a two-year suspension for a first offence "represents the highest threshold admissible under the fundamental rights and

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jurisprudence rendue en application du Code mondial antidopage, in: Jusletter of 20 February 2006, at para. 34.

142 As reported in *Play True*, Issue 2 – 2007 (Science: Honing in on Doping), p. 29. While it is difficult to express a clear view on the legitimacy of that committee, we have not found athletes' statements to the contrary.

143 Claude ROUILLER, *cit supra* Fn. 55, at para 92 as translated at http://www.wada-ama.org/rtecontent/ document/Article_10_2_WADC_ Swiss_Law.pdf.

democratic principles".[144] However, a closer review of the *Krabbe* case shows that there was no indication that the athlete was involved in conduct similar to the circumstances considered as aggravating in Article 10.6. To the contrary, when confirming the lower court's decision, the High Court of Munich stated that the offence at issue was (only) the taking of medication without prescription, which did not weigh very much in comparison with intentional doping. More importantly for the purposes of the present opinion, the Court explicitly noted that "no substantial aggravating factors, that could exceptionally justify a higher penalty, had been put forward".[145]

135. This demonstrates that the admissibility of a higher penalty in case of aggravating circumstances cannot be discarded. Indeed, in a case where the applicable rules provided for a minimum suspension of two years, an arbitration panel acting under the auspices of the American Arbitration Association ("AAA") found appropriate to impose a suspension of eight years because of the severity of the offence:

> The IAAF Rules provide that Collins's use of prohibited substances and prohibited techniques requires a sanction for "a minimum of two years." IAAF Rule 60.2(a)(i). The Arbitral Tribunal may impose a sanction of longer than two years if it finds that the circumstances warrant.
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> 5.4. In this case, the Tribunal finds that a longer suspension is justified. The nature and extent and Collins's doping are severe. She engaged in a pattern of doping involving multiple drugs over a substantial period of time, during which she engaged and succeeded in many competitions. The steroids she took – such as THG – and the complex and coordinated timing of her doping were designed, even more than the usual doping offenses, not to be detected.
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> 5.5. In addition, the Tribunal believes that guidance may be derived from rules regarding athletes who cover up doping offenses. The BALCO scheme was elaborately designed to hide the doping offenses of its athletes. Under the WADA Code, covering up a violation of an anti-doping rule requires a minimum ineligibility of four years, because of the seriousness of that offense. See WADA Code Section 10.4.2. As the Code states in its notes, "those who are involved in […] covering up doping should be subject to sanctions which are more severe than the athletes who test positive."
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> 5.6. In considering the proper sanction, it is also important to consider how other similarly situated athletes have been treated. Those who have admitted

144 LG Munich *Krabbe v. IAAF et. al.*, Decision of 17 May 1995, SpuRt 1995 p. 161, *167* (free translation). See also Ulrich Haas, *Die Überprüfung von Dopingsanktionen durch deutsche Gerichte*, Causa Sport 2004, p. 58, *59*.

145 OLG Munich *Krabbe v. DLV*, Decision of 28 March 1996, in SpuRt 1996, p. 133 *et seq*., at IV.1.b.

> their participation with BALCO and have agreed to cooperate, such as Kern White, have received a two-year suspension. Other BALCO athletes, such as Alvin Harrison and Regina Jacobs, who admitted their guilt but did not agree to cooperate, were given suspensions of four years.
>
> 5.7. Because Collins did not admit to her guilt and has not agreed to cooperate, because her participation in the BALCO conspiracy amounted to a cover up of these activities, and because her doping took place over an extended period of time during which she competed in many events, we believe that it is appropriate to double the four years received by other BALCO athletes or those who engage in cover-ups, and to suspend her for eight years.[146]

136. This example shows that there might be circumstances in which an increase of the sanction is clearly appropriate and at the same time raises the issue of the extent of the admissible increase. For the purpose of the present opinion, the question is whether a four-year maximum period of ineligibility is excessive, knowing[147] that the otherwise applicable suspension is of two years.

137. To answer this question it might be useful to look to the regime of aggravating circumstances in criminal law.[148] A comparative analysis shows that the doubling of the maximum sanction is far from unusual. For instance, Article 138(1) of the Swiss *Code Pénal* provides for a sentence of up to five years for embezzlement. Article 138(2) of the same statue deals with the aggravated offence of Article 138(1), i.e. where the embezzlement is committed as a member of an authority or in the exercise of a profession. This aggravated offence is punished with imprisonment for a period of up to ten years. The French[149], German[150] and Italian[151] Criminal Codes also provide for very

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146 *USADA v. Collins* AAA No. 30 190 00658 04, Award of 9 December 2004, para. 5.3-5.7 available at http://www.usantidoping.org/what/management/arbitration.aspx.

147 It is our understanding that the existence of (i) "specific circumstances" allowing the elimination or reduction of the period of ineligibility for specified substances (Article 10.4 of the 2007 Draft Code) or (ii) "exceptional circumstances" allowing the elimination or reduction of the period of ineligibility for non-specified substances (Article 10.5 of the 2007 Draft Code), practically rule out the possibility of aggravating circumstances.

148 For a similar analogy, *see* Cédric AGUET, *Un an après l'entrée en vigueur du code de l´agence mondiale antidopage – bilan du point de vue des athlètes*, in: Jusletter of 20 February 2006, at para. 67.

149 French *Code pénal* (CPF): Article 311-3 CPF (theft) provides that theft is punished by three years of imprisonment. According to Article 311-5 CPF theft is punished by seven to fifteen years of imprisonment where it is preceded, accompanied or followed by acts of violence upon other persons. Moreover, pursuant to Article 311-8 CPF theft is punished by twenty years of criminal imprisonment where it is committed with the use of a weapon.

150 German *Strafgesetzbuch* (StGB): Article 223 StGB (bodily injury) punishes with imprisonment of not more than five years or a fine, whoever physically maltreats or harms the health of another

significant increases in the maximum penalty in cases where aggravating circumstances were present.

138. That said, one should bear in mind that a four-year ban would most often put an end to an athlete's (high level) career and thus be tantamount to a life ban. Therefore, an aggravated first offence could *de facto* be punished as harshly as numerous second offences (Article 10.7.1) and almost all third offences (Article 10.7.3).

139. This could raise problems if the ineligibility period were automatically of four years in the presence of aggravating circumstances. In reality, Art. 10.6 provides for an increased suspension of *up to* four years, which means that the adjudicating body is afforded sufficient flexibility to take into account all the circumstances to ensure that aggravating circumstances do not systematically result in a four-year period of ineligibility.

140. More generally, the very fact that the adjudicatory body has discretion to impose an ineligibility period ranging from two to four years suffices to deal with the issue of proportionality with respect to Article 10.6. After all, in situations with aggravating circumstances where a longer suspension appears disproportionate, the adjudication body would be free to impose the "standard" suspension of two years.

141. For all these reasons we have no hesitation to conclude that the range of sanctions provided in Article 10.6 of the 2007 Draft Code complies with the fundamental rights of an athlete.

* * *

person. Article 224 StGB punishes with imprisonment from six months to ten years whoever commits bodily harm: 1. through the administration of poison or other substances dangerous to health; 2. by means of a weapon or other dangerous tool; 3. by means of a sneak attack; 4. jointly with another participant; or 5. by means of a treatment dangerous to life.

[151] Italian *Codice penale* (CPI): Pursuant to Article 624 CPI theft is punished by three years of imprisonment. Article 625 CPI provides for specific aggravating factors, such as theft with violence, and provides for two up to six years of criminal imprisonment.

IV. GENERAL CONCLUSION AND ANSWER TO THE QUESTION POSED

142. The conclusion reached in the present opinion may be summarized as follows:

(i) "Aggravating circumstances" are defined with sufficient precision in order to comply with the principle 'no crime nor punishment without law';

(ii) The possibility to avoid the application of an increased suspension by admitting the anti-doping rule violation is compatible with the privilege against self-incrimination and the right to remain silent; and

(iii) The imposition of an ineligibility period of more than two years complies with the principle of proportionality.

143. Hence, the answer to the question posed, *i.e.* whether Article 10.6 of the 2007 Draft Code complies with the fundamental rights of athletes, is clearly affirmative.

144. As a final matter we would like to (re)emphasize that the full impact of any legal provision does not become apparent until the provision is applied.[152] This is particularly true of provisions that afford a great deal of discretion to the courts. The CAS will have to play an important role in implementing Article 10.6, as it has exclusive jurisdiction to decide doping disputes involving "international level athletes". As a private adjudicator, the CAS is not under a direct obligation to enforce international and national instruments of protection of human rights. However, at least as a matter of caution, it should apply the guarantees set out by these instruments by way of analogy. Moreover, the CAS is, in any event, required to enforce the athletes' fundamental rights guaranteed by private law and cannot ignore the relevant rules of competition law.[153]

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152 RIGOZZI/KAUFMANN-KOHLER/MALINVERNI, *cit*. *supra* Fn. 1, p. 67.

153 At the same time, it goes without saying that the "CAS will have to remain conscious of the overall aims and purposes of the anti-doping regime in the Code, to respect the words used in the Articles and the explanations in the notes to the Code and remain aware that outcomes in individual cases may have a broader effect on the interpretation of the Code in other cases internationally" (DAVID, *cit. supra* Fn. 128, ¶ 54).

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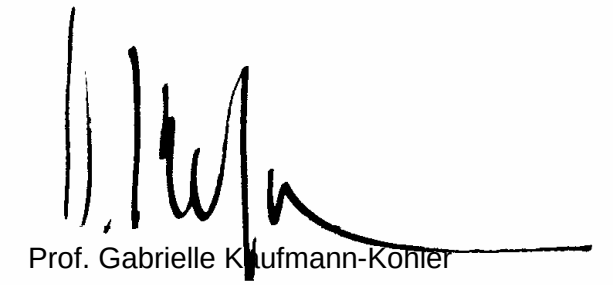

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